

BEFORE THE  
GOVERNING BOARD OF  
SARATOGA UNION SCHOOL DISTRICT  
COUNTY OF SANTA CLARA, CALIFORNIA

In the Matter of the Non-Reemployment of  
Certain Certificated Employees,

OAH No. 2012040079

Respondents.

**PROPOSED DECISION**

Administrative Law Judge Mary-Margaret Anderson, Office of Administrative Hearings, State of California, heard this matter in Saratoga, California, on May 10, 2012.

John R. Yeh, Attorney at Law, Burke, Williams & Sorensen, LLP, represented complainant Lane Weiss, Superintendent of the Saratoga Union School District.

Peder J. Thoreen and P. Casey Pitts, Attorneys at Law, Altshuler Berzon LLP, represented all of the respondents whose names are listed on Appendix A, except James Conn, who was represented by Marilyn Aden, Emeritus Staff, California Teachers Association.

The record was left open to receive written closing argument. Each party timely submitted a closing brief, and they were marked for identification as follows: District's Post-Hearing Brief, Exhibit 20; James Conn's Closing Argument, Exhibit L; and Respondent's Post-Hearing Brief, Exhibit M.

The record closed on May 15, 2012.

**FACTUAL FINDINGS**

1. Complainant Lane Weiss served the Accusations in his official capacity as Superintendent of the Saratoga Union School District (District).

2. Respondents, who are listed on Appendix A, are certificated employees of the District. The District rescinded the March 15 notice it issued to Margaret Ebner. The Accusation against her will be dismissed.

3. On March 14, 2012, the Governing Board of the District adopted Resolution No. 393.2/12, entitled “Resolution to Decrease the Number of Certificated Employees Due to a Reduction in Particular Kinds of Services.” The Board resolved to reduce or discontinue a variety of particular kinds of services, totaling 8.9 full time equivalent positions, for the 2012-2013 school year, and directed Superintendent Weiss to give notice to the certificated employees whose positions would be affected.

4. On March 15, 2012, Superintendent Weiss gave written notice to Respondents that, pursuant to Education Code sections 44949 and 44955, it was being recommended that their services would be reduced or eliminated for the 2012-2013 school year. Respondents filed timely requests for hearing. The District served an Accusation on each Respondent who requested a hearing. Each Respondent filed a notice of defense. The parties stipulated that the District has complied with the requirements of Education Code sections 44949 and 44955.

5. In its resolution, the Board resolved to reduce or discontinue the following particular kinds of services:

<u>Particular Kinds of Services</u>	<u>Number of Full-Time Equivalencies</u>
Kindergarten to 5th Grade	4.9
RMS Electives (Art, French, Leadership & Spanish)	2.0
RMS Vice Principal	1.0
Technology (Teacher on Special Assignment)	<u>1.0</u>
Total:	8.9

6. The services set forth in the board’s PKS resolution are particular kinds of services that may be reduced or discontinued within the meaning of Education Code section 44955. No service is being reduced below a mandated level.

7. Since the Resolution was passed, the Board rescinded the reductions of 1.0 FTE RMS Vice Principal and 1.0 FTE Technology. Accordingly, the FTE’s currently proposed for reduction total 6.9.

8. The reductions are based on the District’s financial situation. A major consideration in determining the reductions was that the cohort of students moving up the grades is smaller, with a resulting decrease in class size. In addition, attrition of students is a factor. And, RMS (Redwood Middle School) students have already been asked to designate which electives they will choose. Based upon the online enrollment sign-ups for electives, it

was determined to reduce Art by .17 FTE; French by .67 FTE; Leadership by 1.0 FTE; and Spanish by .33 FTE. The total is 1.33 FTE, but the District noticed reductions of up to 2.0 FTE's for the four combined areas out of an abundance of caution. Considering all of the circumstances, the reductions are in the interest of the schools and their pupils.

9. The Board established by separate resolution, criteria for determining the order of termination among certificated employees who have the same seniority date. The criteria were applied to certificated employees who share the same seniority date in 2005 and 2006. The District requested that the tie-breaking criteria be validated herein; however, Respondents did not raise any issues as regards the criteria or the application of the criteria.

10. It was established that the District staff properly considered all positively assured attrition before issuing the March 15 notices. There is no reason to doubt that this will continue prior to issuing any final notices.

#### *Challenge to PKS Resolution*

11. It is well settled legally, and consistent with good and fair practice, that school districts should define the services proposed for reduction with as much specificity as possible. This enables noticed employees to reasonably assess the probability of their nonretention. The Respondents affected by the proposed reductions to RMS electives contend that the lack of specificity in the Resolution gave them insufficient notice of the proposed reductions. This contention IS not supported by legal authority and IS not persuasive. The Resolution specifically identified the four subject areas to be reduced; breaking down the 2.0 FTE by percentages of Art, French, Leadership, and Spanish, was not required.

12. In addition, four Respondents who teach in the identified RMS elective areas testified that they engaged in conversations with District employees who advised them of the possible effects of the layoff on them as individuals. The District was not required to provide this information, but it is noted that it weakens Respondents' argument that they did not receive sufficient information to assist them in planning for the 2012-2013 school year.

13. Education Code section 44955 permits layoffs based on a reduction in a "particular kind of service" (PKS) or based upon a decline in "average daily attendance" (ADA). Respondent contend that, because the District factored in projected reduced enrollment, the layoff is, in essence, an ADA layoff misidentified as a PKS layoff, and is therefore invalid. This contention lacks merit. Projected decreases in enrollment provide a valid basis for a PKS layoff and do not convert it to an ADA layoff, which by its terms is based upon calculations of reduced average daily attendance.

14. Respondents further contend that District staff's involvement in implementing the RMS reductions usurped the authority of the Board. As found above, however, the Board sufficiently identified the services to be reduced as four elective subjects to total 2.0 FTE. It

was therefore within the permitted scope of staff authority to implement the layoffs consistently with the Board's resolution.

### *Bumping Issues*

15. Education Code section 44258.2 provides:

The holder of a single subject teaching credential or a standard secondary teaching credential, may, with his or her consent, be assigned by action of the governing board to teach classes in grades 5 to 8, inclusive, in a middle school, if he or she has a minimum of 12 semester units, or six upper division or graduate units, of coursework at an accredited institution in the subject to which he or she is assigned.

Teaching assignments under this provision are commonly referred to as board authorizations. They expire at the conclusion of each school year.

– *Eveonne Lockhart*

16. Eveonne Lockhart holds a multiple subject credential and a single subject physical education credential. She does not have a credential in Health or in Science; she teaches both Health and Science under a board authorization. This year, Lockhart is teaching, at RMS, .17 FTE Physical Education, .7 FTE Science and .33 FTE Health. Her seniority date is August 20, 2007. The subjects taught by Lockhart are not subject to reduction and the District did not notice her for layoff. District staff testified that she was also not noticed because no more senior teacher possesses a Health/Science credential. Therefore, it was reasoned, there was no one who, absent a board authorization, could bump into her Health position. Also considered was Lockhart's experience with the health curriculum. She worked with the school principal to implement the program in the 2009-2010 school year. And her physical education training and experience are additional qualifications in the general area of health.

17. It is acknowledged that districts have significant discretion in the assignment of teachers, but the evidence establishes that there are certificated employees senior to Lockhart who are competent to teach Health. Lockhart did not teach Health in 2010-2011. Respondent Lori Chaikin taught Health in that intervening year, also under a board authorization. And Respondents Elizabeth Belles and Sheridan Kurtz-Fenster credibly testified that the principal told them that they were eligible to teach health. These facts belie District's assertion that Lockhart, who is junior to every Respondent save Holly Michelony, is properly retained over senior teachers.<sup>1</sup>

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<sup>1</sup> In its closing argument, District contends that Lockhart is properly retained under Education Code section 44955, subdivision (d)(1), which permits districts to retain less senior employees if the district "demonstrates a specific need for personnel to teach a

18. Education Code section 44955, subdivision (b), provides in part: “The services of no permanent employee may be terminated . . . while any other employee with less seniority, is retained to render a service which said permanent employee is certificated and competent to render.” Accordingly, the District must identify the most senior teacher who was prejudiced by Lockhart’s retention, and may not issue a final layoff notice to that person to the extent of the improper retention.

– *Respondent James Conn*

19. Respondent James Conn is the most senior teacher to have received a layoff notice this year. His seniority date is August 23, 2004. He holds a single subject social science credential and a board authorization to teach English and Yearbook. This year, Conn teaches .67 FTE Core and .17 FTE Yearbook. (He also teaches .17 FTE Study Hall/Tutorial, which has no special requirements.) He has taught under board authorizations for eight years. Conn is very close to receiving his single subject credential in English. None of the courses taught by Conn are targeted for reduction. The District represented that he was noticed solely as a precautionary measure.

20. Respondent teachers with less seniority than Conn, who hold multiple subject credentials and have assignments subject to reduction, contend that they are entitled to bump into Conn’s Core and Yearbook assignments, because he teaches them pursuant to a board authorization, and not a credential. This contention is rejected. There is no evidence that Conn will not receive a board authorization for next year. He could also be given a different assignment that comports with whatever credentials he holds in advance of the 2012-2013 school year. To allow junior teachers to in essence, “bump up” into the position of a senior teacher in these circumstances would be in contravention of the Education Code requirement that layoffs must be accomplished in inverse order of seniority. Respondents present no compelling authority in support of this position. Accordingly, the Accusation against Respondent Conn will be dismissed.

#### *Other Matters*

21. Respondents contend that “the District bears the burden of proving that it properly classified as temporary two employees who it seeks to dismiss but who did not receive layoff notices and thus were not included in these proceedings.” No authority was presented in support of the theory that jurisdiction exists to decide this issue, and it is

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specific course or course of study . . . and that the certificated employee has special training and experience necessary to teach that course or course of study . . . , which others with more seniority do not possess.” The reason for this argument is unclear. This procedure, commonly referred to as “skipping,” only comes into play where the teacher proposed to be skipped despite his or her lack of seniority is assigned to a course of study targeted for reduction. As stated above, that is not the case with Lockhart.

rejected. Accordingly, this decision does not address the status of the two non-respondent employees.<sup>2</sup>

22. All contentions made by respondents not specifically addressed above are found to be without merit and are rejected.

23. Except as stated above, no permanent employee is being terminated while a permanent or probationary employee with less seniority is being retained to render a service which the permanent employee is certificated and competent to render.

24. The cause for the reduction in particular kinds of services relates to the welfare of the schools and the pupils thereof.

### LEGAL CONCLUSIONS

1. Jurisdiction for this proceeding exists pursuant to Education Code sections 44949 and 44955, and all notices and other requirements of those sections have been provided as required.

2. By reason of the matters set forth in Finding 2, there is no cause pursuant to Education Code section 44955 to give final notice to Respondent Margaret Ebner.

3. By reason of the matters set forth in Findings 16 through 18, there is no cause pursuant to Education Code section 44955 to give final notice to the most senior certificated employee who was prejudiced by the District's failure to allow the employee to bump into the .33 FTE position of Eveonne Lockhart.

4. By reason of the matters set forth in Findings 19 and 20, there is no cause pursuant to Education Code section 44955 to give final notice to Respondent James Conn.

5. Cause exists because of the reduction of particular kinds of services pursuant to Education Code section 44955 to give notice to certificated employees occupying 6.9 FTE positions that their services will be reduced or eliminated for the 2012-2013 school year. This cause relates solely to welfare of the schools and the pupils thereof within the meaning of Education Code section 44949.

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<sup>2</sup> Mandamus is the appropriate remedy for a temporary teacher seeking reclassification. (*Campbell v. Graham-Armstrong* (1973) 9 Cal.3d 482, 485.)

## ORDER

1. The Accusation against Respondent Margaret Ebner is dismissed.
2. The most senior certificated employee who was prejudiced by the District's failure to allow the employee to bump into the .33 FTE position of Eveonne Lockhart shall be retained for a .33 FTE position for the 2012-2013 school year.
3. The Accusation against Respondent James Conn is dismissed.
4. Except as set forth above, notice may be given to certificated employees occupying 6.9 full-time equivalent positions that their services will be reduced or eliminated for the 2012-2013 school year.

DATED: May 17, 2012

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MARY-MARGARET ANDERSON  
Administrative Law Judge  
Office of Administrative Hearings

## **APPENDIX: A**

### List of Respondents:

1. Elizabeth Belles
2. James Conn
3. Lori Chaykin
4. Margaret Ebner
5. Assaf Josh Henig
6. Susan Jacobs
7. Sheridan Kurtz-Fenster
8. Holly Michelony
9. Christie Nielsen
10. Marcus Puhvel
11. Debra Willheim